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No. 92-29

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HAROLD E. FORD, *et al.*,
Petitioners,

v.

UNITED STATES and
THE HONORABLE JUDGE ODELL HORTON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The reasons advanced by the government for denying certiorari cannot withstand scrutiny.

1. The government does not dispute that review by this Court would be warranted if the district court transferred jury selection from Memphis in reliance on a generalization that the black citizens of Memphis could not be fair jurors. Rather, it contends that the district court did not rely on such a generalization, and that counsel has misconstrued the district court's words. Br. Opp. 10. The court's words require no construction, however, and the government's attempt to recast the decision as one simply based on publicity and juror misconduct is unavailing.

In framing the issue to be decided, the district court repeatedly focused on race:

> And stripped to its bare bones, what we are talking about is whether *a very popular black congressman* and whether the government and these other things can receive a fair trial from a jury selected in Memphis *where a large part of the population is minority.*
>
> And a—and a question of whether *minority jury members* are willing to be open minded and fair and consider the evidence in the case, the law that applies to that evidence and follow the court's instructions.
>
> . . .
>
> . . . .
>
> Now it seems to me that talking about whether a popular person can get a fair trial or not does not get down to the issue that this court must face, and that is a question, is it possible—is it possible in Memphis Tennessee, *given it's demographic makeup,* for a fair jury to be selected and impaneled to try this case.

Pet. App. 40a-41a (emphasis added). The court's later statement that it was referring to the "willingness," and not to the capability, of black jurors to be fair, *id.* 41a, clarified the rationale for the court's generalization, but in no way changed its racial basis.

The references that were made to publicity and alleged juror misconduct do not change the fact that the court relied on a generalization about the attitude of the black citizens of Memphis. The record demonstrates that the concern of the government and the court was that publicity had made the black community of Memphis biased against the government. Similarly, the alleged juror misconduct was by some black members of the first jury. Since those individuals of course were not eligible to serve on the second jury, the only reason that the government and the court emphasized their alleged misconduct was that it purportedly demonstrated the bias of the black community against the government.

The record permits only one fair reading: the transfer was based on a conclusion by the district court that the black minority population of Memphis was not willing to be fair to the government in a trial of this popular black elected official. This is a race-based generalization that the Constitution simply does not tolerate, whether or not there is a purported basis for making such a generalization. *See* Pet. 22-23.

2. The government also argues that Fed. R. Crim. P. 18 allows intradistrict transfers to avoid prejudicial publicity. Br. Opp. 8. The government cites no case, however, in which a case has been transferred within a district solely to protect *the prosecution* from allegedly prejudicial publicity. A transfer to protect a defendant from prejudicial publicity is permissible under the language of Rule 18 allowing consideration of "the convenience of the defendant" and, in fact, may be required to protect a defendant's constitutional right to a fair trial, *see* Pet. 14 n.24. By contrast, a transfer to protect the prosecution from such publicity is permissible only on the view that the factors expressly enumerated in Rule 18 are not controlling. Such a view clearly was the basis for the transfer ruling here, for the district court ordered the transfer despite finding that the factors enumerated in the Rule required that the trial be in Memphis. Pet. App. 35a.

The question whether the factors listed in Rule 18 are controlling has produced a conflict among the courts of appeals. *See* Pet. 16. Given the central importance of this issue to the proper application of Rule 18 and the frequency with which federal courts are called upon to fix the place of trial within a district, the issue merits review by this Court.[1]

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[1] The government contends that it is permissible under the Jury Selection and Service Act of 1968 to select the jury from one division and hold the trial in another division. Br. Opp. 9 n.3. It argues that 28 U.S.C. § 1861 does not provide an independent ground for relief, and that in any case the transfer here does not offend the

3. According to the government, the many cases recognizing that mandamus is available to review transfer orders are irrelevant because they involved interdistrict, not intradistrict, transfers. Br. Opp. 11. There is, however, no principled basis for permitting review of orders in the former category but not in the latter category.

The government also contends that mandamus is unavailable because "petitioners have no right to a trial in any particular division of a district." *Id.* What petitioners do have, however, is a right to have the place of the entire trial fixed based on the factors enumerated in Rule 18, rather than in disregard of those factors, *see* Pet. 16, and a right not to have the place of jury selection moved based on a generalization that violates the Constitution, *see id.* 21-23. Mandamus is a proper means of enforcing those rights.

4. The government maintains that the issues raised by petitioners are not "ripe" for review because petitioners

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policy stated in § 1861 because the court could have moved the entire trial to the Eastern Division. Neither argument is sound. First, even if the declaration of policy in § 1861 does not provide an independent ground for relief, surely that declaration is entitled to great weight in interpreting the remainder of the Act, including the express provision in 28 U.S.C. § 1866(c) that, with certain exceptions not relevant here, "no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors." By its action in moving the place of jury selection to the Eastern Division, the district court improperly disqualified all residents of the Western Division from serving as jurors in a case to be tried in the Western Division. Second, given the district court's finding that "the convenience of the defendants, witnesses and the prompt administration of justice" dictated that the retrial be in the Western Division, Pet. App. 35a, the government is incorrect in asserting that the court could have moved the trial to the Eastern Division. That finding, and the mandatory language of the second sentence of Rule 18, would have made it improper for the court to move the trial to the Eastern Division. Finally, even if the court could have moved the trial to the Eastern Division, it does not follow that the Jury Selection and Service Act allows the court to "import" jurors from one division for a trial in another division.

may be acquitted at their retrial, in which case the issues they raise will be moot. Br. Opp. 7. That argument lacks merit, for this Court has often granted review in similar situations in which an issue raised in a petition for certiorari was important and was "fundamental to the further conduct of the case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 154 (1964); *see Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see also United States v. Williams*, 112 S. Ct. 1735, 1738 (1992) (certiorari granted where court of appeals had affirmed dismissal of indictment without prejudice); *Serfass v. United States*, 420 U.S. 377, 383 (1975) (certiorari granted where court of appeals had rejected claim of double jeopardy and remanded for a new trial). Clearly, whether the jury for the retrial is to be drawn from outside the division where the trial is to be held is a matter "fundamental to the further conduct of the case." *Cf. Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (certiorari granted to review denial of petition for mandamus seeking to set aside orders directing that issues would be tried to the court rather than to a jury); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 251 (1957) (certiorari granted to review writs of mandamus compelling district court to vacate orders referring cases for trial before a master).

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CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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